



BOARD OF INQUIRY (*Human Rights Code*)

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Public June 18/96

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Mary Gallagher dated October 11, 1991, alleging harassment and discrimination in employment on the basis of marital status.

B E T W E E N :

Ontario Human Rights Commission

- and -

Mary Gallagher

Complainant

- and -

The Regional Municipality of Hamilton-Wentworth
William McMillin Carson
Robert Prowse

Respondents

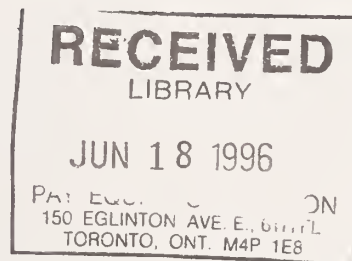
DECISION

Adjudicator : Mary-Woo Sims

Date : June 17, 1996

Board File No: BI-0043-95

Decision No : 96-018



Board of Inquiry (*Human Rights Code*)

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A P P E A R A N C E S

Ontario Human Rights Commission	)	
	)	Anne Posno, Counsel
	)	
Mary Gallagher	)	
	)	Mark Zega, Counsel
	)	
Regional Municipality of Hamilton-Wentworth and Robert Prowse	)	
	)	Liam Rafferty, Counsel
	)	
William McMillin Carson	)	
	)	Douglas Hodgson, Counsel
	)	

THE COMPLAINT

Mary Gallagher alleges that she was discriminated against and harassed in employment because of marital status contrary to what are now sections 5(1), 5(2) and 9 of the *Ontario Human Rights Code*.

THE ISSUES IN DISPUTE

In her complaint signed October 11, 1991, Mrs. Gallagher alleges that as a result of her relationship with John Gallagher, she was the victim of a course of events which constituted harassment and discrimination during her employment with the Respondent, the Regional Municipality of Hamilton Wentworth (the Region). These events can be described as: the transfer; the creation of a poisoned work environment; the performance review; the reprimand; and the position of Legislative Coordinator.

The events relied upon by the Complainant raise two legal issues which should be dealt with prior to the consideration of the factual questions. These are:

1. Were the Complainant and Mr. Gallagher in a relationship coming within the definition of marital status during any or all of the events alleged to constitute discrimination?
2. Does the definition of marital status in the *Code* extend to the identity of one's spouse?
In other words, does harassment or discrimination resulting from the identity of one's spouse constitute a breach of the *Code*?

SUBMISSIONS

Commission counsel asked that I find that the Region and the personal respondent, Mr. Carson applied the Region's nepotism policy to Mrs. Gallagher (then Ms Giacomelli) in transferring her to the Clerks Department in September 1988 because of her relationship with Mr. Gallagher. Furthermore, Commission counsel submitted that Mrs. Gallagher was harassed and subjected to a poisoned work environment because of her relationship with and subsequent marriage to John Gallagher. Counsel submitted that if I were to find that the Complainant was subjected to harassment and/or discriminatory treatment, I must then determine if harassment or unequal treatment resulting from the identity of one's spouse constitutes a breach of the *Code*. Counsel submitted that based on jurisprudence, the identity of one's spouse falls under the protected ground of marital status and is contrary to the *Code*.

Commission counsel referred me to the Federal Court of Appeal decision in *Cashin v. Canadian Broadcasting Corporation* (1988), 9 C.H.R.R. D/5343 and the Supreme Court of Canada's decision in *Brossard (Town) v. Quebec (Commission des droits de la personne)* (1989), 10 C.H.R.R. D/5515. Commission counsel submitted that the Courts recognize that discrimination on the basis of marital status extends to situations where adverse treatment results from the identity of one's spouse.

Both counsel for the Respondents deny that Mrs. Gallagher was harassed and/or discriminated against because of her marital status. They argued that the transfer occurred for bona fide reasons and as a result of work related concerns involving perceptions of conflict of interest. Furthermore, they submitted the evidence demonstrated that Mrs. Gallagher (then Ms Giacomelli) agreed to be transferred to the Clerks Department and that the transfer resulted in higher pay, more prestige and better career advancement opportunities for her. They argued that these facts, if accepted by me, do not establish discrimination.

Furthermore, it was the position of both counsel for the Respondents that the Complainant's relationship with John Gallagher at the time of the transfer does not fall within the definition of "marital status" contained in the *Code*.

Counsel for the Respondents further argued that the protections accorded under the provisions of the *Code* on the basis of marital status do not extend to the identity of one's spouse. In their submission, protection against marital status discrimination accorded under the *Code* is based on one's group characteristic, that is, the status of being married, single, widowed, divorced or separated and not to whom the person is married or related to.

THE CODE

Section 10(1) of the *Code* says:

“marital status” means the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage.

As a result of the Board of Inquiry decision in *Leshner v Ontario (No. 2)* (1992), 16 C.H.R.R.

D/184 (Ont. Bd. Inq.), “opposite sex” has been read out of the definition.

ISSUE ONE

Were the Complainant and Mr. Gallagher in a relationship coming within the definition of marital status during any or all of the events alleged to constitute discrimination?

Evidence

The most important evidence concerning her marital status in 1988 came from Mrs. Gallagher. She testified that she was separated from her husband when her relationship with John Gallagher first developed in the spring of 1988. Her relationship with John Gallagher became public knowledge by the summer of 1988. They did not start to cohabit until the spring of 1989 and were married on March 31, 1990. Mrs. Gallagher testified that she considered John Gallagher to be her spouse as of the spring of 1989.

The evidence of Mr. Carson, Mr. Sears and of Ms Dawson was that a romantic relationship existed between Mr. Gallagher and the Complainant in the summer of 1988.

In *Brossard*, the Supreme Court of Canada found that the Town of Brossard discriminated against Line Laurin because of her civil status when it refused to hire her as a lifeguard because her mother was already employed by the municipality. The Court held that the discrimination occurred not just because Ms Laurin was her mother's daughter, but also because her mother was already employed by the municipality, the Court found that these two factors operated together to form a single, indivisible cause. The Court also found that the Town's anti-nepotism policy was overly broad and could not be justified as a bona fide qualification for employment.

The decision, dealing with the provisions of the Quebec *Charter of Human Rights and Freedoms*, dealt extensively with the definition of "civil status". With respect to the extent to which spousal identity is included in the expression "civil status" the Court said at page D/522:

Marriage is plainly relevant to civil status. Discrimination can of course be practised on the basis of marital status in absolute terms. What about marital status in relative terms? Is the identity of a person's spouse relevant to discrimination under s. 10?

The Court quoted from MacGuigan J. in *Cashin* and said:

It is sufficient, for the purposes of the case at bar, to limit the meaning of civil status to an exclusion practised against an individual "identified by a group characteristic" to use the expression employed by MacGuigan J. The exclusion established by the Respondent's hiring policy can be said to create such a group characteristic: all immediate relatives, including spouses, of full-time employees and town councillors are excluded from consideration. To paraphrase MacGuigan J. for the purposes of the case at bar, a general no-relative, no-spouse employment rule, precisely because in its generality it may have the effect of imposing a general or group category, does fall into civil status. It is not necessary in this instance to decide whether the identity of the particular spouse is included in the notion of marital or civil status and I refrain from so doing.

In the *Cashin* decision, the Court dealt with an allegation of discrimination on the basis of marital status. The term “marital status” is not defined in the *Canadian Human Rights Act*. Rosann Cashin, a writer/radio broadcaster with CBC, had her employment terminated because her husband Richard Cashin, a prominent figure in Newfoundland, had been appointed to the Board of Directors of Petro Canada. The CBC was of the view that Mrs. Cashin would no longer be perceived by the public to be an objective reporter on the news regarding resource issues. The Court of Appeal found that Mrs. Cashin was discriminated against because of her marital status. It was because she had the same name as her husband that the CBC believed there was a problem with objectivity. In addition, she was treated differently than she would have been had she been associated with Richard Cashin in a relationship other than as a spouse, or if they were divorced.

In the *Cashin* case at page D/5346 , MacGuigan J. wrote:

The case was argued that the applicant was discriminated against, if at all, not because she was married *per se*, but because she was married to a particular public figure. The second issue is therefore whether spousal identity is included in the concept of marital status, which was the alleged ground of discrimination in this case. Both tribunals were agreed that it is so included, but their conclusions on this point were challenged before this Court by the first Respondent. The first Respondent’s argument was that one must look first to the plain, ordinary and natural meaning of the words used, which in this case, it argued, is status in the sense of “married or not married” or in relation to marriage as in the categories “single,” “married,” “widowed,” or divorced”.

MacGuigan J., further states at page D/5348:

In my opinion, the first Respondent has the stronger case on a literal meaning approach. Marital status normally does mean no more than status in the sense of “married or not married” and is not considered to include the identity and characteristics of the spouse.

He goes on to discuss the purpose of the *Act* and comes to this conclusion at page D/5340:

“In fine, what the *Act* discourages is discrimination against an individual, not in his/her individuality, but as a group cypher, identified by a group characteristic. Consequently, the identity of a particular spouse cannot be included in the notion of marital status because it is a purely individual rather than a group aspect of life. However, it seems to me that a general no-spouse employment rule, precisely because in its generality it may have the effect of imposing a general or group category, may well fall under marital status. As in *Mark*, supra, or the American cases it follows, it is not a particular spouse that is brought into question, but any spouse of any existing employee. The approach I adopt might perhaps be thought of as an intermediate position between a broad and a narrow one.

In the case at bar, was there discrimination based on marital status in the sense just defined? This was not the basis of which either Tribunal decided the case, nor the basis of which it primarily argued before this Court by the parties. Nevertheless, although the adjudicator adopted the broadest view of marital status, she also found discrimination based on narrower considerations as well.”

MacGuigan J. writes at page D/5352:

It became apparent at the hearing before the adjudicator that there is no written policy established by the first Respondent relating to the spouses of employees, but it is clear from the testimony of Donna Logan that the policy that was thought to exist adversely differentiated against married women who adopted their husbands' surnames. In my view this is discrimination based on a primary incident of marital status. It is discrimination under the aspect of group rather than of individual. Such adverse differentiation tending to affect employment opportunities thus exactly constitutes a *prima facie* discriminating practice under both sections 7 & 10 of the *Act*, and the employer is therefore liable, unless it can establish that it falls within the exception of a *bona fide* occupational requirement in subsection 14(a) of the *Act*.”

The Court then went on to deal with whether or not an exception could be applied in this case. In the case before me, the complaint is that Mrs. Gallagher was subjected to a series of events which she alleges is discrimination and harassment because of marital status. These incidents arose not as a result of her status of being in a common-law relationship or married, but as a result

of the animus of the Respondents towards her husband. In simple terms, the Complainant alleges that the Respondents had ill feelings towards her husband and took those feelings out on her by discriminating against her and harassing her.

Finding

I adopt MacGuigan J.'s reasoning that the identity of a particular spouse cannot be included in the notion of marital status because it is a purely individual rather than a group aspect of life. I am assisted in this view by the specific language contained in the *Code* pertaining to the definition of "marital status", that is, "the status of being married...". The identity of one's spouse is not included.

Having said this, it is important to note that *Code* contains provisions that protect against discrimination because of a relationship or association with a person or persons identified by a prohibited ground of discrimination. It is possible that a finding of discrimination could be made where the unequal treatment is as a result of the identity of one's spouse if the spouse were a member of a historically disadvantaged group intended to be protected by the *Code*. But this is not the case before me.

Accordingly, it is unnecessary for me to consider whether the evidence supports a finding of adverse treatment or whether the evidence establishes that any adverse treatment was related to the Complainant's relationship to Mr. Gallagher.

COSTS

The Respondents have asked that in the event that the complaint is dismissed, I remain seized to consider the issue of costs. I will ask the Registrar to schedule a conference call in order for the parties and I to discuss how best to proceed to hear submissions on the matter of costs.

Dated at Toronto this 17th day of June 1996.

A handwritten signature in dark ink, consisting of a large, stylized 'M' followed by a series of loops and a long horizontal stroke extending to the right.

Mary Woo Sims
Board of Inquiry

